

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT)
91828-s43Q BY ROBERT G. AND)
BETTY R. RATLIFF)

FINAL ORDER

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the September 13, 1995, Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

Application for Beneficial Water Use Permit 91828-s43Q by Robert G. and Betty R. Ratliff is denied.

NOTICE

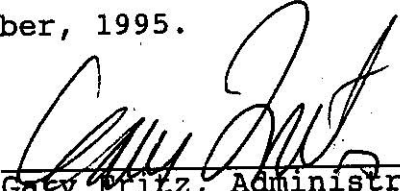
The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make

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arrangements with the Department of Natural Resources and Conservation for the ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape of the oral proceedings to the district court.

Dated this 25 day of October, 1995.


Gary Fritz, Administrator
Department of Natural Resources
and Conservation
Water Resources Division
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6605

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record, first class mail, at their address or addresses this 25th day of October, 1995 as follows:

Robert G. & Betty R. Ratliff
8736 Camelot Ln
Billings, MT 59106

Thomas B. & Jean G. Boyer
8730 King Ave. W
Billings, MT 59106

Gregory Paul Johnson
Transwestern 1 Suite 230
404 N. 31st St.
Billings, MT 59101

Keith Kerbel, Manager
Billings Water Resources
Regional Office
1537 Avenue D, Suite 121
Billings, MT 59102
(via electronic mail)

Vivian A. Lighthizer,
Hearing Examiner
Department of Natural
Resources & Conservation
1520 E. 6th Ave.
Helena, MT 59620-2301


Cindy G. Campbell
Hearings Unit Legal Secretary

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	PROPOSAL
FOR BENEFICIAL WATER USE PERMIT)	FOR
91828-s43Q BY ROBERT G. AND)	DECISION
BETTY R. RATLIFF)	

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on July 18, 1995, in Billings, Montana, to determine whether a permit should be granted to Robert G. and Betty R. Ratliff for the above-entitled application under the criteria set forth in Mont. Code Ann. § 85-2-311(1) and (5) (1993).

APPEARANCES

Applicants Robert G. and Betty R. Ratliff appeared at the hearing *pro se*.

James McDonald and Art Thiel appeared at the hearing as witnesses for Applicants.

Objectors Thomas B. and Jean G. Boyer appeared at the hearing in person and by and through counsel Gregory Paul Johnson.

Keith Kraft and Albert Kraft appeared at the hearing as witnesses for Objectors.

Keith Kerbel, Manager, and Marty Van Cleave, Water Resources Specialist, of the Billings Water Resources Regional Office of the Department of Natural Resources and Conservation (Department), attended the hearing.

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EXHIBITS

Applicants offered five exhibits for the record. All were accepted without objection.

Applicants' Exhibit 1 is a photocopy of an aerial photograph. A red circle identified as "dam" has been drawn in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 14, Township 1 South, Range 24 East, Yellowstone County, Montana.'

Applicants' Exhibit 2 is a single page captioned "Pond Log" May 10, 1995. This log was kept as an experiment to determine whether there are springs that maintain the water level in Applicants' pond.

Applicants' Exhibit 3 is a photocopy of a letter from Cove Irrigation Co. stating the shares Applicants have and the cost of using those shares.

Applicants' Exhibit 4 consists of 11 photographs in a plastic bag. The photographs of importance are identified by written comments or dates in red ink. The photographs were taken by Robert Ratliff.

Applicants' Exhibit 5 is a photocopy of an invoice from Kent Forrester for building a reservoir. The invoice is dated July 24, 1985.

Objectors offered 13 exhibits for the record. All were accepted without objection.

'Unless otherwise stated all land descriptions are located in Township 1 South, Range 24 East, Yellowstone County, Montana.

Objectors' Exhibit 1 consists of two documents. One document which consists of five pages of photocopies of an application for beneficial water use dated July 27, 1990, and the permit to appropriate water issued for that application. The second document consists of copies of the aforementioned documents with certain items on the permit highlighted.

Objectors' Exhibits 2 through 7 are photographs taken during the period from May 10, 1995 to May 31, 1995, by Tom Boyer.

Objectors' Exhibit 2 is a photograph of Objectors' pond.

Objectors' Exhibit 3 is the same scene as Objectors' Exhibit 2, but taken on a different day.

Objectors' Exhibit 4 is a photograph of Objectors' pond and the landscape surrounding it.

Objectors' Exhibit 5 is a photograph of Objectors' pond taken in late spring.

Objectors' Exhibit 6 is a duplicate of Objectors' Exhibit 4.

Objectors' Exhibit 7 is a photograph of Objectors' pond taken after snowfall.

Objectors' Exhibit 8 consists of two documents. One, consisting of five pages, is a photocopy of an application for beneficial water use permit dated August 22, 1994. The second document consists of five pages, photocopies of the first document with certain items on the second document highlighted.

Objectors' Exhibit 9 is an aerial photograph taken in 1979 of a portion of the NW $\frac{1}{4}$ of Section 14.

Objectors' Exhibit 10 is an aerial photograph taken in 1992 of a portion of the NW¼ of Section 14.

Objectors' Exhibit 11 is a clear Mylar overlay with certain features sketched on it to show the old reservoir in relation to the new reservoir.

Objectors' Exhibit 12 is a copy of an invoice from Morrison Maierle/CSSA for Objectors' Exhibits 9 and 10.

Objectors' Exhibit 13 is a notebook, 3.5" wide by 5.5" long, which is a continuing log of the test performed by Robert Ratliff and Tom Boyer to determine whether there were springs feeding the reservoir.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

FINDINGS OF FACT

1. Application for Beneficial Water Use Permit in the name of and signed by Robert G. and Betty R. Ratliff was filed with the Department on December 5, 1994, at 11:01 a.m. (Department file.)

2. Pertinent portions of the file were published in the *Billings Gazette*, a newspaper of general circulation in the area of the source, on March 1, 1995. Additionally the Department served notice by first-class mail on individuals and public agencies which the Department determined might be interested in or affected by the proposed appropriation. One timely objection was received by the Department and Applicants were notified of

the objection by a letter from the Department dated April 7, 1995. (Department file.)

3. Applicants seek to appropriate 10.80 acre-feet of water from an unnamed tributary of Canyon Creek by means of an on-stream dam located in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 14 for fish and wildlife from January 1 through December 31, inclusive of each year. The reservoir created by this dam enlarges an existing reservoir from 3.00 acre-feet to 5.4 acre-feet. The proposed place of use is the NW $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 14. (Department file.)

4. Applicants have proven by a preponderance of evidence the proposed use is a beneficial use. The pond provides recreation for Applicants.' Fish have been introduced and apparently thrive in this reservoir. Betty Ratliff's father caught several (14 or 19) "nice" crappie the day before the hearing. There are four-pound bass in the pond. (Testimony of Robert Ratliff.)

5. Applicants have proven by a preponderance of evidence the proposed means of diversion, construction, and operation of the appropriation works are adequate. The dam was constructed without a permit in 1985 approximately 90 feet downstream of an existing dam.' A twelve-inch overflow pipe has been installed approximately 24 inches from the top of the dam which also has a

'Mr. Ratliff testified they also use the reservoir for stock; however, he did not apply for stock use with this application.

'Objector Tom Boyer testified the dam was built at a later date; however, Objectors presented no other evidence to counter Applicants' testimony and Applicants' Exhibit 5 which is an invoice marked "paid". The date on this invoice is 7/24/85.

spillway. There is no drainage device in the dam to drain the reservoir if the need arises. However, water has been removed from the reservoir by siphoning with a two-inch siphon, a one-inch siphon, and/or a five-eighths inch garden hose. (Department file, Applicants' Exhibit 5, Objectors' Exhibit 13, and testimony of Robert Ratliff and Tom Boyer.)

6. Applicants have not proven by a preponderance of evidence there are unappropriated waters in the source of supply at the proposed point of diversion at times when the water can be put to the use proposed in the amount Applicants seek to appropriate and that during the period in which Applicants seek to appropriate, the amount is reasonably available. Because the reservoir was constructed in 1985 and after the initial filling and topping off each spring, water flows through the overflow pipe approximately every two weeks or any time Applicants irrigate, water is clearly physically available at the point of diversion. It is not clear, however, that the water has not been appropriated for use downstream by Objectors. (Testimony of Robert Ratliff and Applicants' Exhibit 4.)

7. Applicants have proven by a preponderance of evidence the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved. There are no unperfected permits or water reservations on the source of supply. Objectors have a permit for a different reservoir on the drainage just west of the proposed source; however, that drainage would not be

affected by the proposed appropriation. (Department file and testimony of Tom Boyer.)

8. Applicants have proven by a preponderance of evidence they have a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. Applicants own the place of use. (Department file and testimony of Art Thiel, Robert Ratliff and Betty Ratliff.)

9. No objections relative to water quality were filed against this application nor were there any objections relative to the ability of a discharge permit holder to satisfy effluent limitations of his permit. (Department file.)

10. Applicants have not proven by a preponderance of evidence the water rights of a prior appropriator would not be adversely affected. If the dam is blocking flows that would otherwise reach Objectors, then Objectors are adversely affected.

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all substantive procedural requirements of law or rule have been fulfilled; therefore, the matter was properly before the Hearing Examiner. See Findings of Fact 1 and 2.

2. Applicants have not met all the criteria for issuance of a beneficial water use permit. See Findings of Fact 6 and 10.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER


Application for Beneficial Water Use Permit 91828-s43Q by Robert G. and Betty R. Ratliff is denied.

NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party. The responses must be filed within 20 days after service of the exception and copies must be sent to all parties. No new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 13th day of September, 1995.


Vivian A. Lighthizer,
Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6615

MEMORANDUM

Applicants did not apply for a beneficial water use permit when the new dam was constructed because they believed the water collected in the reservoir was water from the Cove Ditch for which they paid to irrigate the pasture around the reservoir. The pasture consists of approximately one acre. Applicants hold 32 shares in the Cove Ditch. Since they had paid for the water, Applicants assumed the water belonged to them.

Some of the water in this drainage originates as seepage from the Cove Ditch which is not lined in this area. There is a shale layer at approximately 27 feet to 34 feet below the surface. This seepage is joined by the irrigation water and naturally occurring water. When the conjoined waters percolate down to the shale, it then flows horizontally manifesting as springs in those areas where the shale layer contacts the ground surface. (Testimony of James McDonald and Albert Kraft.)

Applicants did divert water from the proposed source and for the proposed purpose prior to filing an application or receiving a permit to do so. Although diverting water without a permit is a misdemeanor and criminal sanctions may apply, the penalties authorized do not include denial of a permit. Mont. Code Ann. §§ 85-2-122 and 46-18-212 (1993). The Department has no statutory authority to deny a permit on such grounds. Furthermore, whether the diversion works were first operated "illegally" is not relevant to how data from that operation serves to satisfy the criteria for issuance of a permit. The dam has been in place

since 1985. Therefore one must conclude the dam is adequate. Even the lack of a permanently installed drainage device does not render the diversion works inadequate because siphons have been used successfully to get water to Objectors' pond and could be used again.

It appears Applicants' dam was constructed before Objectors' pond. However, a priority date is not assigned to a new water right until the date an application is filed with the Department, regardless of which reservoir was constructed first. Clearly Objectors have an earlier priority date, thus a senior right.

Two witnesses for Applicants testified there were no natural springs in the draw where Applicants' dam is located, thus no water flow from springs onto Objectors' property. Two witnesses for Objectors testified there were springs on Applicants' property creating a two-inch water flow onto Objectors' property. Objectors allege all but one of those springs are now behind Applicants' dam and cannot supply the water as before the dam was constructed. Whether there are springs in the bottom of Applicants' reservoir makes no difference.

This permit is being denied because Applicants did not meet their burden of proof. Based on the testimony and other evidence submitted, this Hearing Examiner simply cannot determine that the Objectors' senior right is not adversely affected by Applicants' reservoir. This decision does not mean that the Hearing Examiner has determined that Objectors' senior permit is adversely affected. Rather, it means that Applicants did not submit sufficient

information to overcome an appearance of adverse effect created by the circumstance that Applicants' pond is upstream from Objectors' pond and is full whereas Objectors' pond is not.

Applicants argue that their pond is filled by runoff of irrigation water they have purchased from the Cove Ditch Company. They claim they are entitled to recapture that water in their pond. Although there may be merit to this argument, Applicants did not submit sufficient information to establish that it is contract water that fills the pond.

It was Applicants' burden to show that unappropriated water is available and that senior rights are not adversely affected. To do so Applicants needed to establish how much water in the drainage may be seepage from the Cove Ditch, irrigation runoff, or natural runoff, the extent of seepage out of their pond down the gully toward Objectors' pond and the extent of the evaporative losses from their pond. Absent this kind of information, this permit cannot be granted.

CERTIFICATE OF SERVICE


This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record, first class mail, at their address or addresses this 13th day of September, 1995, as follows:

Robert G. and Betty R. Ratliff
8736 Camelot Ln.
Billings, MT 59106

Thomas B. and Jean G. Boyer
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